

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

PATRINA FREEMAN,

Plaintiff,

-VS-

**TOWN OF IRONDEQUOIT, KIMMIE ROMEO, and
JOHN PERTICONE,**

Defendants.

**DECLARATION OF COUNSEL IN
OPPOSITION TO PLAINTIFF'S
MOTION TO AMEND THE
COMPLAINT AND IN FURTHER
SUPPORT OF DEFENDANTS'
MOTION TO DISMISS**

Civil Action No.
6:22-cv-6136 (DGL)

SCOTT P. ROGOFF, declares as follows:

1. I am an attorney-at-law duly licensed to practice in the State of New York and a partner with the law firm of Barclay Damon LLP. Our office represents the Defendants Town of Irondequoit (the "Town"), Kimie Romeo (incorrectly named as "Kimmie Romeo") and John Perticone in the above action. I am fully familiar with the matters set forth herein.

2. I make this Declaration in opposition to the Plaintiff's Motion to Amend the Complaint in the above action upon the grounds that the proposed Amended Complaint proffered by Plaintiff would be futile as a matter of law.

3. I also make this Declaration in further support of the Defendants' Motion to Dismiss the Plaintiff's Complaint in this matter pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief may be granted.

PROCEDURAL HISTORY

4. On March 23, 2022, Plaintiff filed a Complaint in the United States District Court for the Western District of New York against the Defendants herein. (Docket No. 1.)

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5. On April 25, 2022, Defendants filed a Motion to Dismiss the Complaint for failure to state a claim. (Docket No. 6).

6. On July 22, 2022, Plaintiff filed a Motion to Amend/Correct the Complaint, to which a proposed Amended Complaint was attached. (Docket No. 14; Ex.2). Plaintiff also filed a Memorandum of Law in opposition to Defendants' Motion to Dismiss. (Docket No. 15)

GROUND IN SUPPORT OF DEFENDANTS' OPPOSITION

7. As set forth in Defendants' Memorandum of Law in Opposition to Plaintiff's Motion to Amend the Complaint and Reply Memorandum in Further Support of Defendants' Motion to Dismiss, (hereafter, "Defendants' Memo in Opposition"), Plaintiff's Proposed Amended Complaint suffers from the same substantive defects which are fatal to her original Complaint, namely, that it likewise fails to allege sufficient facts to support any cause of action against the Defendants.

8. Indeed, Plaintiff's Amended Complaint contains the exact same alleged events as those alleged in the original Complaint – none of which, as noted in Defendants' Memorandum of Law submitted in support of its Motion to Dismiss (Docket No. 6-2) support a cognizable cause of action as a matter of law. There is nothing new. *See*, Defendants' Memo in Opposition, pp. 2-3.

9. In addition, the proposed Amended Complaint hurls subjective, and self-serving barbs at Defendants along with purely speculative and unsupported statements in effort to disguise her personal opinions as statements of fact. They are not. *See*, Defendants' Memo in Opposition, pp. 4-5.

10. Plaintiff takes a parallel approach in adding to her original Complaint blanket and self-serving opinions and beliefs designed to suggest that she was treated differently from Caucasian employees and Town representatives, including the refrain that similar objectionable conduct was not directed to those who are white. *See*, Defendants' Memo in Opposition, p. 5. The proposed Amended Complaint fails, however, to allege any *facts* supporting Plaintiff's purely speculative beliefs.

11. Plaintiff's proposed Amended Complaint does not allege any facts that plausibly suggest the Defendants were motivated by racial animus toward her, rather, she instead alleges a host of perceived and trivial slights she *perceives* to be discriminatory (and accordingly violate her Equal Protection Rights) but as alleged, they are nothing of the sort.

12. Attached hereto as **Exhibit A** is document comparing the amendments offered by Plaintiff to her original Complaint. Upon review of that exhibit, it quickly becomes evident that the majority of amendments are stylistic and editorial rather than substantive, and do not plead facts giving rise to a causal connection between any allegedly unlawful conduct and Plaintiff's race.

13. By way of example, the proposed Amended Complaint substitutes: "her fellow Councilmembers" with "her fellow Town Councilmembers" (proposed Amended Complaint, ¶15); "explained" with "asserted" (proposed Amended Complaint, ¶29); "buy lunch" with "arrange for the town to pay for lunch" (proposed Amended Complaint, ¶38;) and "budget was approved," with "budget had been approved" (proposed Amended Complaint, ¶44). These amendments do nothing to save the Complaint from dismissal.

14. As set forth in Defendants' Memo in Opposition, the Plaintiff's Motion to Amend the Complaint should be denied because the proposed amendment would be futile; Plaintiff has failed to submit anything by way of factual allegation either in her Motion to Amend or in her opposition to Defendants' Motion to Dismiss, to support any cause of action against the Defendants or to cure the fatal flaws that her claims are barred by legislative and qualified immunity. *See*, Defendant's Memo in Opposition, pp. 7-10. Accordingly, Plaintiff's Motion to Amend the Complaint should be denied, and Defendants' Motion to Dismiss should be granted.

In accordance with 28 U.S.C. §1746, I declare under penalty of perjury that the foregoing is true and correct.

WHEREFORE, for all of the reasons detailed above and in the Defendants' accompanying Memorandum of Law, the undersigned respectfully requests that this Court enter an Order:

- (A) Denying Plaintiff's Motion to Amend the Complaint with prejudice and on the merits;
- (B) Granting Defendants' Motion to Dismiss the Complaint with prejudice and on the merits;
and
- (C) Granting such other and further relief as the Court deems just and proper.

DATED: August 1, 2022

BARCLAY DAMON LLP

By: /s/ Scott P. Rogoff
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